

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CHRISTOPHER NERO; MARIA NERO,  
Plaintiffs,  
v.  
NITA EVANS, *an individual and Trustee of  
the Evans Family Trust*; JAMES TONDELLI,  
SR.; PRESIDIO MORTGAGE, INC.;  
CALPACIFIC MORTGAGE  
CONSULTANTS; DOES 1 THROUGH 20,  
Defendants.

Civil No. 09cv958- POR

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

**I. INTRODUCTION**

On May 5, 2009, Plaintiffs Christopher and Maria Nero filed a Complaint alleging twenty-one claims against Defendants Nita Evans (“Evans”), individually and as trustee of the Evans Family Trust UDT Dated 3-10-86 (“the Evans Family Trust”), James Tondelli Sr. (“Tondelli”), Presidio Mortgage, Inc. (“Presidio”), CalPacific Mortgage Consultants (“CalPacific”), and Does 1 through 20.<sup>1</sup> (ECF No. 1.) Plaintiffs subsequently settled with Defendants CalPacific, Nita Evans and the Evans Family Trust. (ECF Nos. 9 and 29.)

On October 8, 2010, the Honorable Dana M. Sabraw held a Pretrial Conference, during which Plaintiffs were informed for the first time that their attorney, Kent Wilson, had resigned from the California State Bar so that they had no attorney to represent them at trial. (*See* ECF No. 33.)

<sup>1</sup> Plaintiffs settled with Jim Potts of CalPacific prior to filing this action.

1 The Court continued the trial for 30 days to allow Plaintiffs to obtain new counsel. (*Id.*) On  
 2 November 5, 2010, Orlando Foote, Esq., the new counsel, filed his appearance as Plaintiffs' attorney  
 3 of record. (ECF No. 38.) The parties consented to Magistrate Judge jurisdiction on March 1, 2011.  
 4 (ECF No. 52.)

5 At the time of the original Pretrial Conference, Plaintiffs' allegations stemmed from the 2009  
 6 foreclosure proceedings against their home on Cahuilla Avenue in Imperial, California.<sup>2</sup> However,  
 7 at the May 3, 2011 Pretrial Conference held before Magistrate Judge Louisa S Porter, Plaintiffs' new  
 8 attorneys disclosed an intention to present evidence at trial on the theory that Defendants engaged in  
 9 a pattern or practice of predatory lending. Counsel then indicated that both loans obtained by  
 10 Plaintiffs from Evans and Presidio would be relevant to the issues of the case: the 2006 loan for the  
 11 purchase of the Dennis Court Property ("the First Loan") and the 2007 loan for the purchase of the  
 12 Cahuilla Property ("the Second Loan"). Plaintiffs also abandoned nine claims, leaving the following  
 13 claims against Defendants Tondelli and Presidio: (1) intentional misrepresentation; (2) breach of  
 14 fiduciary duty; (3) breach of covenant of good faith and fair dealing; (4) violation of California  
 15 Financial Code § 4970, et seq.; (5) negligence; (6) accounting; (7) violation of the Real Estate  
 16 Settlement Procedures Act, 12 U.S.C. §§ 2601, et seq.; (8) violation of California Business and  
 17 Professions Code §§ 17200, et seq.; (9) violation of California Civil Code § 2923.5; (10) violation of  
 18 California Civil Code § 1572; (11) conspiracy; and (12) breach of contract. (*See* ECF No. 66 at 21.)

19 The parties waived jury trial on April 19, 2011 (ECF No. 62) and a bench trial commenced  
 20 before Judge Porter on May 9, 2011.

21 The Court provided Plaintiffs with considerable latitude in allowing them to (1) change their  
 22 arguments after the pretrial conference before District Judge Sabraw, and (2) permitting Plaintiffs to  
 23 subpoena documents directly to Court on the first day of trial. However, at the Pretrial Conference  
 24 before Magistrate Judge Porter, Plaintiffs attempted to add an expert witness, Winston P. Ohrn.  
 25 Upon objection by counsel for Defendants, the Court struck Mr. Ohrn as a potential witness. At no  
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27 <sup>2</sup> There are three properties at issue in this case. The Court refers to the property Plaintiffs' received from Mr.  
 28 Nero's grandmother as the "San Diego Property." The Court refers to the first home Plaintiffs purchased in Imperial as the  
 "Dennis Court Property" and the second home they purchased in Imperial as the "Cahuilla Property."

1 time did either party seek a continuance. Plaintiffs also attempted to supplement the record after the  
 2 trial had ended, which was denied by the Court in an Order stating, “[the Court] will not accept  
 3 additional evidence at this stage of the proceedings.” (ECF No. 80).

## 4 **II. JURISDICTION**

5 Plaintiffs filed the instant action in federal court on May 5, 2009. (ECF No. 1.) In the  
 6 Pretrial Order dated February 18, 2011, the Honorable Dana M. Sabraw found the Court had  
 7 jurisdiction, including subject matter jurisdiction over the matter. (*See* ECF No. 49 at 3.) However,  
 8 at the time of trial, Plaintiffs had abandoned all of their federal causes of action save the violation of  
 9 the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. § 2601(b)(2). (*See* ECF No. 66 at  
 10 26.) As noted below, RESPA does not apply to the loans at issue. Though it is within the Court’s  
 11 discretion to remand the state law causes of action, the Court finds that Plaintiffs’ claims arise from  
 12 the same common nucleus of operative facts and are also so intertwined that the interests of  
 13 efficiency and judicial economy prevail. The Court elects to exercise supplemental jurisdiction  
 14 under 28 U.S.C § 1367 and decide Plaintiffs’ state law causes of action as well.

## 15 **III. FINDINGS OF FACT**

16 Based upon stipulated facts, findings of fact in the Pretrial Order and the evidence presented  
 17 at trial, this court makes the following Findings of Fact:

18 Plaintiff, Christopher Nero, was employed by the Imperial County Irrigation District for  
 19 eleven years prior to the events that gave rise to the instant action. In 2003 he sustained a serious  
 20 injury to his left shoulder while performing his job as a water patrol which resulted in significant  
 21 pain and loss of work. Although he had every intent to return to work, Christopher Nero was off  
 22 work on temporary disability and receiving workers compensation benefits until mid 2007. For the  
 23 2 ½ years prior to 2005, Plaintiffs lived in a mobile home in Imperial, California. The Nero  
 24 household consisted of Christopher, Maria, and their two children. Plaintiffs, Christopher and Maria  
 25 Nero, had not previously owned real property or applied for a mortgage and were unfamiliar with  
 26 those processes.

27 In 2005, Mr. Nero’s grandmother deeded to him her home located on Demus Street in San  
 28 Diego, California which was free and clear of any liens (“the San Diego Property”). Despite

1 receiving title to the San Diego Property, Plaintiffs desired to purchase a home of their own in  
2 Imperial. They contacted Joe McCormick<sup>3</sup>, a real estate agent, and, with his assistance, located a  
3 home on Dennis Court in Imperial (“the Dennis Court Property”). Plaintiffs’ credit rating was  
4 abysmal and therefore they could not qualify for any conventional loan to purchase the Dennis Court  
5 Property.<sup>4</sup> Because of this, McCormick referred Plaintiffs to Jim Potts and CalPacific to explore  
6 financing options. After reviewing their credit score and loan application with stated income, Potts  
7 advised Plaintiffs that they could not qualify for either a conforming loan or a sub-prime mortgage,  
8 but there was still hope for them to obtain a loan. He told them he would “put them in the system.”  
9 Because Potts was not licensed to secure hard-money loans, he contacted Dale Huntley at Presidio,  
10 who specialized in originating private loans, to discuss possible hard-money lending.

11 On January 18, 2006, Plaintiffs signed an Agency Agreement with Presidio (“the 2006  
12 Agency Agreement”). (Exhibit 34.) In it, Plaintiffs agreed to appoint Presidio as their exclusive  
13 agent to find and procure a lender and complete a loan agreement on their behalf for a stated  
14 commission. In return, Presidio agreed to use its best efforts to secure a lender for Plaintiffs. The  
15 agreement for the exclusive agency appointment was limited to one month and was irrevocable until  
16 February 18, 2006. The Agency Agreement expressly disclosed that a dual-agency relationship may  
17 exist as Presidio may also be an agent for the lender.

18 That same day, Plaintiffs completed and signed a Loan Purpose Statement (Exhibit 49) in  
19 which Plaintiffs represented the loan would be used for the purchase of real property and for  
20 business purposes, i.e., to purchase the Dennis Court Property and to renovate the San Diego  
21 Property for sale or rental.<sup>5</sup> In this transaction, all documents were sent to Potts and signed by the  
22 Plaintiffs at the same time, which included the agency agreement and the disclosure statement  
23 setting forth the commission, loan amount and terms. In particular, it proposed loan terms of 10.5%  
24 interest for 5 years, with interest only payments and a balloon payment at the end of the 5 year term.

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26 <sup>3</sup> Joe McCormick is not named as a Defendant in this case.

27 <sup>4</sup> Testimony at trial from Defendant Tondelli was it was the worst credit score he had seen in years.

28 <sup>5</sup> For all relevant claims, the First Loan is not a “covered” loan as discussed in Section G below.

1 These terms were approved by the Neros. Based on the testimony, it remains unclear who proposed  
2 the total loan amount. Potts testified that the Neros initial request was a “cash out” loan on the San  
3 Diego Property to enable them to purchase the Dennis Court Property for cash. However, the San  
4 Diego property did not appraise sufficiently for such a loan resulting in both properties being  
5 required for the loan collateral. Based on this change the Neros requested a loan sufficient to  
6 purchase the Dennis Court property, provide them with cash to fix up the San Diego Property and to  
7 pay off debt. Nita Evans, a 92 year old private hard-money lender, agreed to lend \$350,000 to the  
8 Neros. Plaintiffs did not have any contact with Tondelli during the loan application process.

9 The Loan Escrow Instructions, signed by Tondelli and Christopher Nero, confirm that both  
10 the Dennis Court Property and the San Diego Property were encumbered as security for the loan.  
11 (Exhibit 43.) The two homes had a combined value of \$686,000, which was a sufficient loan to  
12 value ratio to support the \$350,000 loan. The Mortgage Loan Disclosure Statement, signed by both  
13 Plaintiffs, reflects the loan amount and lien on both properties. (Exhibit 35.) On February 3, 2006,  
14 both Plaintiffs signed and recorded a Short Form Deed of Trust and Assignment of Rent documents  
15 for the Dennis Court and San Diego Properties, which designate Evans and the Evans Family Trust  
16 as beneficiary of the properties. (Exhibits 2 and 3.) Despite this documentation, Plaintiffs testified it  
17 was their belief that the San Diego Property would be the only property encumbered by this loan.  
18 The Neros both testified that they were rushed into signing loan document papers. Conversely, Potts  
19 testified it was his practice to explain the terms and conditions of a loan to his clients. Despite the  
20 conflicting testimony, the Court finds that both the San Diego Property and the Dennis Court  
21 Property were encumbered as security for the first loan.

22 The Dennis Court Property was purchased for \$268,500.<sup>6</sup> (Exhibit 1.) The February 3, 2006  
23 Settlement Statement on the Dennis Court Property reveals a total settlement charge of \$49,353.97,  
24 which included the following: \$17,500 commission to Presidio; \$955 processing fee to Presidio; and  
25 \$7750 commission to CalPacific. (*Id.*) The statement further indicates that Plaintiffs received  
26 \$32,929.11 in cash. (*Id.*) The Plaintiffs used these funds to pay off various debts, including Mrs.

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28 <sup>6</sup> The Court refers to the Dennis Court transaction as the “First Loan.”

1 Nero's approximately \$18,000 car loan. Plaintiffs also invested approximately \$10,000 to renovate  
2 the San Diego Property. Plaintiffs then opted to sell the San Diego Property rather than rent it. An  
3 unnamed San Diego realtor advised the Neros that the property would show better if empty. Based  
4 on this advice, the Neros did NOT rent the San Diego property during the time the property was  
5 listed for sale but listed the home for its loan appraised value of \$418,000. However, it was on the  
6 market for over a year with no offer. During that time period, the market for single family homes  
7 entered a downward cycle and Plaintiffs derived no revenue from the San Diego Property.

8 The monthly payment on the First Loan was \$3,062.50. Plaintiffs made nine timely payments  
9 totaling approximately \$27,000. During this time period, Plaintiffs paid interest on the loan and  
10 even attempted to pay additional amounts towards the principal. Evans rejected these excess  
11 payments, claiming it would be "too difficult" for her to do the book-keeping if the Neros on  
12 occasion paid varying amounts towards the principal. Evans applied the extra payments to the  
13 following month's interest payment.

14 After nine payments, based on the Neros then-stated combined incomes of \$3,600 per month,  
15 Plaintiffs could no longer afford the \$3000 monthly payments and became fearful of foreclosure on  
16 the property. Mr. Nero testified he contacted Evans to explain their inability to make the monthly  
17 payments and asked Evans to take the San Diego Property in forgiveness of the loan. According to  
18 Mr. Nero's testimony, Evans responded, "Why? I have both homes as security for the loan."  
19 Despite the fact that his signature appears on the Loan Escrow Instructions (Exhibit 43), Mortgage  
20 Loan Disclosure Statement (Exhibit 35) and Deed of Trust (Exhibit 2), Mr. Nero claimed this was  
21 the first time he was aware of the lien on the Dennis Court Property.

22 Mr. Nero testified that he feared an impending foreclosure and that Evans would take both  
23 properties. Even though the Neros were not making payments, Nita Evans never initiated foreclosure  
24 proceedings on the properties. Plaintiffs attempted unsuccessfully to sell the San Diego Property.  
25 The Dennis Court Property had insufficient value to cover the First Loan and property values in  
26 Imperial were significantly depressed by that time.

27 Mrs. Nero gave birth to their third child during this period. She testified that they needed a  
28 home with more room to accommodate the larger family. By December, 2006 and with the

1 assistance of Joe McCormick, Plaintiffs located the Cahuilla home in Imperial (“the Cahuilla  
2 Property”). Plaintiffs located this home before they sold either the San Diego Property or the Dennis  
3 Court Property. They would be able to close on the Cahuilla Property as soon as they acquired the  
4 the money but that required that they sell both the San Diego and Dennis Court properties to proceed  
5 with the purchase. Their credit had not improved since the First Loan transaction, so once again  
6 they could not qualify for either a conforming or sub-prime mortgage. Faced with this circumstance,  
7 McCormick again referred Plaintiffs to Potts and CalPacific to assist in financing. Potts informed  
8 the Plaintiffs that their only option for financing would be a hard-money loan from Presidio and  
9 Evans.

10 On January 9, 2007, Plaintiffs signed a second Agency Agreement with Presidio (“the 2007  
11 Agency Agreement”). (Exhibit 10.) In exchange for a \$11,480 commission, Plaintiffs agreed to  
12 appoint Presidio as their exclusive agent to find a lender and complete a loan agreement. In return,  
13 Presidio again agreed to use its best efforts to secure a lender. The agreement provided the agency  
14 appointment was irrevocable until February 19, 2007. Identical to the 2006 Agency Agreement, this  
15 agreement notified Plaintiffs that a dual-agency relationship may exist. Plaintiffs had no contact  
16 with Tondelli during the second loan application process; all dealings were with Mr. Potts.

17 Surprisingly, Plaintiffs sold both the Dennis Court Property and the San Diego Property  
18 within weeks of one another. According to the January 10, 2007 Settlement Statement for the San  
19 Diego Property, Plaintiffs paid off the First Loan of \$350,000, netting an additional \$130,000 from  
20 the sale of the properties. (Exhibit 15.) They also paid \$14,700 to Evans as a “prepayment penalty”  
21 on the First Loan. (*Id.*) Plaintiffs never requested forgiveness of the penalty. However, at trial, all  
22 of the witnesses testified that had Plaintiffs waited two weeks, the prepayment penalty provision of  
23 the First Loan would have expired and they would not have owed this amount to Evans. According  
24 to Potts’ testimony, it was against his advice that the Neros insisted on closing on the Cahuilla  
25 Property as quickly as possible.

26 Approximately two weeks later, on January 24, 2007, Plaintiffs closed on the Cahuilla  
27 Property. (Exhibit 23.) The Neros purchased the home for \$264,000, using \$100,000 from the sale  
28 of the Dennis Court and San Diego Properties as a down payment. Evans financed the remainder

1 with a new \$164,000 loan.<sup>7</sup> (*Id.*) The Settlement Statement on the Cahuilla Property reveals a total  
2 settlement charge of \$15,581.06, which included the following disbursements: \$8200 commission to  
3 Presidio; \$955 processing fee to Presidio; and \$3280 commission to CalPacific. (Exhibit 23.)

4 The Second Loan issued under the same terms as the First Loan; except the interest rate  
5 increased by one point to 11.5%. The Loan Purpose Statement indicates the Second Loan was  
6 secured only for the purchase of residential property.<sup>8</sup> (*See* Exhibit 25.) The Second Loan obligated  
7 Plaintiffs for monthly interest-only payment to Evans reduced to \$1571.67. At this time, Plaintiffs  
8 still had a combined income of \$3600 a month and testified they were happy with the monthly  
9 payments on the loan. However, the parties presented conflicting evidence regarding a promise to  
10 refinance. The Plaintiffs testified to being promised the opportunity to refinance after one year and  
11 entered the Second Loan in reliance on that promise. Tondelli testified, however, that no such  
12 promise was made. The Plaintiffs' testimony at trial also conflicted with their earlier deposition  
13 testimony. Mr. Nero stated in his deposition that there was no promise to refinance the Second Loan  
14 after one year. Mrs. Nero's deposition testimony was identical to her husband's on this issue. The  
15 court finds that based on the lack of contact with Tondelli or Presidio, the only remaining  
16 Defendants in this case, the claimed promise was not made by either Tondelli or Presidio.

17 After making only four payments on the Second Loan, Plaintiffs' circumstances changed  
18 dramatically. When Christopher Nero received the loan on the Cahuilla Property, he believed he  
19 would be going back to work. While fully employed he earned a monthly salary of \$4,186.00. Mr.  
20 Nero's medical condition rendered him unable to return to work and his worker's compensation  
21 benefits ceased after two years of payments. Plaintiffs then sought assistance from Mr. Nero's  
22 grandparents, who paid an additional two months payments on the Second Loan. Mr. Nero also  
23 contacted his employer for assistance where he was informed of his company-sponsored long-term  
24 disability insurance policy with Hartford Insurance. Mr. Nero started to collect \$2400 per month  
25 from this policy, but the payments arrived late on numerous occasions. Moreover, Mr. Nero's  
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27 <sup>7</sup> The Court refers to the Cahuilla Drive transaction as the "Second Loan."

28 <sup>8</sup> For all relevant claims, the Second Loan is considered a "covered" loan as discussed in Section G below.

1 growing medical problems required the Plaintiffs to make more visits to a doctor in San Diego,  
2 which increased the family's expenses. At the same time, the family's income decreased because  
3 Mrs. Nero often took time off of work to accompany her husband to these appointments. At some  
4 point, Plaintiffs relayed their situation to Evans, who told them to "hurry and make your payments."

5 Fourteen months after the Second Loan, Mr. Nero called Tondelli and asked for help  
6 refinancing the Second Loan under the Agency Agreement. According to Mr. Nero's testimony,  
7 Tondelli chuckled and said "I am Nita's agent, not yours." Mr. Nero then contacted Evans directly,  
8 who said she would get in touch with Tondelli. By October 2008, Plaintiffs had also contacted the  
9 Doan Law Firm for assistance in modifying their mortgage payments. (*See* Exhibits 44-45.)  
10 Plaintiffs' then attorneys negotiated with Evans on their behalf. (*Id.*) It is unclear when Evans  
11 presented Plaintiffs with loan modification options, but it is clear she made two oral offers to modify  
12 the Second Loan (as detailed below), both of which were rejected by Plaintiffs.<sup>9</sup>

13 Shortly after this rejection, Tondelli served Plaintiffs with a Notice of Default. (*See* Exhibit  
14 27.) A written declaration containing Evans' attempts to modify the loan, however, was not  
15 provided with the Notice of Default. The Default (Exhibit 27), recorded on November 5, 2008, lists  
16 Presidio as the duly appointed trustee on the Deed of Trust (Exhibit 18), executed by Plaintiffs on  
17 January 16, 2007. Plaintiffs then filed an Ex Parte Application for Temporary Restraining Order in  
18 Imperial County Superior Court to stop the foreclosure. However, they were unable to post the  
19 \$10,000 bond required for that relief. (*See* Exhibits 46-47.) The Neros remained in the Cahuilla  
20 Property without making payments for a number of months. At some point, they moved in with  
21 Mrs. Nero's parents, where they currently reside.

22 On February 11, 2009, Presidio recorded the Notice of Trustee's sale of the Cahuilla  
23 Property setting the date and time of sale for March 5, 2009 at 3:00 p.m. (Exhibit 28.) Evans, who  
24 took ownership of the Cahuilla Property as the credit bidder, passed away while this action was  
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26  
27 <sup>9</sup> Plaintiffs had failed to pay property taxes. Based thereon, Evans offered 2 options: 1) Neros pay the back taxes  
28 and add the unpaid amounts to the back end of the loan; or 2) Deed the property to Evans, she would pay the back taxes, the  
Neros could rent for three years and buy the property back from her at the end of the three years.

1 pending.<sup>10</sup> The property is presently held in the Estate of Nita Evans.

## 2 IV. CONCLUSIONS OF LAW

### 3 A. Joint Venture

4 As a preliminary matter, Plaintiffs argue Defendants Tondelli and Presidio engaged in a joint  
5 venture with Potts to generate commissions by securing hard-money loans. Because Potts was not  
6 licensed to broker hard-money loans, Plaintiffs contend Potts had to cooperate with Defendants to  
7 secure the loan transactions in this case. Plaintiffs contend this created a joint venture such that,  
8 even though Plaintiffs settled with Potts, Defendants Tondelli and Presidio may be held liable for  
9 any of Potts' misrepresentations or predatory lending practices.

10 Defendants contend that no joint venture existed. At best, Potts and Defendants were  
11 cooperating brokers under California real estate law and the transaction at issue in this case was a  
12 simple referral by Potts to Defendants.

13 “A joint venture exists where there is an agreement between the parties under which they  
14 have a community of interest, that is, a joint interest, in a common business undertaking, an  
15 understanding as to the sharing of profits and losses, and a right of joint control.” *Bank of California*  
16 *v. Connolly*, 36 Cal. App. 3d 350, 364 (1973) (internal quotations omitted); *see also Kaligian v.*  
17 *Menezes*, 36 Cal. App. 4th 573, 586 (1995); CA BAJI 13.40 (Spring 2011 Ed.). An essential  
18 element of a “joint venture is the right of joint participation in the management and control of the  
19 business. Absent such right, the mere fact that one party is to receive benefits in consideration of  
20 services rendered” does not, as a matter of law, make him a joint venturer. *Bank of California*, 36  
21 Cal. App. 3d at 364 (internal citations omitted). “Whether a joint venture relationship exists is a  
22 question of fact, depending on the intention of the parties.” *Pellegrini v. Weiss*, 165 Cal. App. 4th  
23 515, 525 (2008) (citing *April Enterprises, Inc. v. KTTV*, 147 Cal. App. 3d 805, 820 (1983)); *see also*  
24 *Preach v. Monter Rainbow*, 12 Cal. App. 4th 1441, 1457 (1993).

25 Here, there is no evidence in the record that Defendants and Potts intended to form a joint  
26 venture. Although Potts had worked with Presidio on multiple occasions, he testified he referred  
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28 <sup>10</sup> Plaintiffs settled with Evans' estate after her death but before trial.

1 Plaintiffs to Presidio in this case only because they would not qualify for conforming or sub-prime  
2 mortgages from any other lender. According to Potts, he “had no other option” to secure a lender for  
3 the Neros. Even assuming the loan transactions at issue constituted a “common business  
4 undertaking,” there is no indication Potts and Presidio shared a right of joint control. In fact, the  
5 limited evidence presented suggests Potts and Presidio performed different roles during the loan  
6 application process. Potts prepared the loan applications and interacted with Plaintiffs, but he had  
7 no ability to locate or secure a loan. On the other hand, Tondelli and Presidio did not have a license  
8 to prepare loan applications or secure any loans other than hard-money loans. In fact, Presidio  
9 secured a lender for Plaintiffs without any participation from Potts, then sent a series of documents  
10 to Potts’ office for Plaintiffs to sign. While Presidio and CalPacific, Potts’ employer, both received  
11 commissions based on their individual roles in the loan process, commissions which were fully  
12 disclosed to Plaintiffs, each performed different functions in the process. (*See* Exhibits 1 and 23.)

13 At closing, Plaintiffs cited *Gray v. Jannss Investment Co.*, 186 Cal. 634 (1921), for the  
14 premise that mere cooperation among real estate brokers is sufficient to form a joint venture. In  
15 *Gray*, plaintiffs, real estate brokers, brought action against defendants, also real estate brokers, to  
16 recover a portion of the commission paid for an exchange of property. In *Gray*, plaintiffs alleged  
17 that after a series of negotiations, the parties entered an oral agreement to cooperate in the  
18 transaction and share the commission. Based on the partnership between the parties, the Supreme  
19 Court of California held plaintiffs were entitled to real property received by defendants as  
20 commission from the exchange. 186 Cal. at 642-43.

21 While cooperating brokers may form a partnership or joint venture under some  
22 circumstances, *Gray* does not support the proposition that cooperation alone is sufficient to form a  
23 joint venture. Evidence that Potts cooperated with Presidio does not establish a joint venture absent  
24 the parties’ intention and the essential element of a right to joint control. *See Bank of California*, 36  
25 Cal. App. 3d at 364. Accordingly, the Court finds there is insufficient evidence of a joint venture  
26 and therefore Defendants cannot be held liable for Potts’ alleged misconduct on that basis.

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28 ///

1 **B. Conspiracy**

2 Although not specifically argued at trial, in Count 20 of their Complaint, Plaintiffs argue  
 3 Defendants may also be liable for Potts' actions on the basis of a conspiracy. "Conspiracy is not a  
 4 cause of action, but a legal doctrine that imposes liability on persons who, although not actually  
 5 committing a tort themselves, share with the immediate tortfeasors a common plan or design in its  
 6 perpetration." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994).  
 7 "By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts  
 8 of other coconspirators within the ambit of the conspiracy. In this way, a coconspirator incurs tort  
 9 liability co-equal with the immediate tortfeasors." *Id.* at 511.

10 To prove a claim for civil conspiracy, Plaintiffs must establish: "(1) the formation and  
 11 operation of the conspiracy, (2) the wrongful conduct in furtherance of the conspiracy, and (3)  
 12 damages arising from the wrongful conduct." *Kidron v. Movie Acquisition Corp.*, 40 Cal. App. 4th  
 13 1571, 1581 (1995) (citing *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 511  
 14 (1994)); *see also Doctor's Company v. Superior Court*, 49 Cal. 3d 39, 44 (1989). "The sine qua non  
 15 of a conspiratorial agreement is the knowledge on the part of the alleged conspirators of its unlawful  
 16 objective and their intent to aid in achieving that objective." *Kidron*, 40 Cal. App. 4th at 1581  
 17 (internal quotations omitted.) "Mere association does not make a conspiracy." *Id.* at 1582.

18 Plaintiffs seem to suggest Potts and Defendants conspired to place them in situations where  
 19 they were "bound to fail." It is unclear from the record what Plaintiffs contend was the object of the  
 20 alleged conspiracy. The Court presumes, based on arguments presented at trial, that the object of the  
 21 conspiracy was the generation of commissions and foreclosure of the properties. Yet, there is no  
 22 evidence of any agreement between Defendants and Potts whatsoever, let alone a conspiratorial  
 23 agreement, to generate commissions or prey upon Plaintiffs' poor credit history and coerce them into  
 24 loans they could not afford.<sup>11</sup> The record demonstrates only that Potts referred Plaintiffs to Presidio  
 25 because he was unable to secure any other lender. If Potts committed any wrongful acts during the  
 26 loan application process, there is no evidence he did so in furtherance of a conspiratorial agreement,

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27  
 28 <sup>11</sup> Although Plaintiffs do not seem to argue Defendants conspired with CalPacific, Potts' employer, the testimony  
 in the record also indicates Defendants did not have any agreement in place with CalPacific.

1 or that Defendants had any knowledge of Potts' allegedly "unlawful objective." *Kidron*, 40 Cal.  
 2 App. 4th at 1581. Accordingly, the Court finds there is insufficient evidence to establish a  
 3 conspiracy and thus Defendants cannot be held liable for Potts' alleged misconduct on that basis.

4 **C. Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601, et seq.**

5 Plaintiffs contend Defendants violated Real Estate Settlement Procedures Act, 12 U.S.C.A.  
 6 § 2607 (RESPA) by providing kickbacks as part of a real estate settlement service and providing a  
 7 fee portion for real estate settlement services. Specifically, Plaintiffs argued that because Nita Evans  
 8 most likely deposited the Neros' mortgage payment checks in a federally insured bank account,  
 9 RESPA governed their loans.

10 RESPA governs "federal related mortgage loans," which include loans "made in whole or in  
 11 part by any lender the deposits or accounts of which are insured by any agency of the Federal  
 12 Government, or is made in whole or in part by any lender which is regulated by any agency of the  
 13 Federal Government." 12 U.S.C.A. § 2602 (1)(B)(I).

14 There is no evidence in the record to indicate that the loans at issue in this case are covered  
 15 by RESPA. Both Plaintiffs and Defendant Tondelli testified that both the First and Second Loans  
 16 were hard-money loans from Nita Evans, loans which are not insured by any agency of the Federal  
 17 Government. Further, no evidence was presented at trial that Nita Evans was regulated by any  
 18 agency of the Federal Government. Specifically, no evidence was presented that Ms. Evans ever  
 19 deposited Plaintiffs' mortgage payment checks in a federally insured bank. Regardless, the Court  
 20 does not find Plaintiffs' far-reaching argument compelling. Thus, Defendants did not violate 12  
 21 U.S.C.A. § 2607. Accordingly, Plaintiffs are not entitled to any recovery under this statute.

22 **D. Intentional Misrepresentation**

23 In Count 1 of the Complaint, Plaintiffs allege Defendants knowingly misrepresented material  
 24 information during the loan application process. Under California law, Plaintiffs must establish the  
 25 following essential elements for a claim of fraud by an intentional misrepresentation:

- 26 1. Defendants made a representation as to a past or existing material fact;
- 27 2. The representation was false;
- 28 3. Defendants must have known that the representation was false when made;

- 1           4. Defendants made the representation with an intent to defraud Plaintiffs, that  
2           is, Defendants must have made the representation for the purpose of  
3           inducing Plaintiffs to rely upon it and to act or to refrain from acting in  
4           reliance thereon;
- 5           5. Plaintiffs were unaware of the falsity of the representation; must have acted  
6           in reliance upon the truth of the representation and must have been justified  
7           in relying upon the representation;
- 8           6. And, finally, as a result of the reliance upon the truth of the representation,  
9           Plaintiffs sustained damage.

10 CA BAJI 12.31 (Spring 2011 Ed.).

11 Plaintiffs seem to allege three misrepresentations: (1) Defendants misrepresented Plaintiffs'  
12 income on loan application documents; (2) Defendants misrepresented that the San Diego Property  
13 was the only property secured as collateral for the First Loan; and (3) Defendants misrepresented  
14 Plaintiffs would have the option to refinance the Second Loan.

15 1. Misrepresentation of Income

16 Plaintiffs allege Potts inflated their monthly income on loan application documents, thereby  
17 securing a loan Plaintiffs could not afford. However, even assuming Plaintiffs' allegations are true,  
18 Defendants cannot be held liable for Potts' actions. First, Potts was not a Defendant at the time of  
19 trial, as Plaintiffs had settled with him. Further, as discussed above, the Court finds there is neither a  
20 joint venture nor a conspiracy between Defendants and Potts. Based thereon, Plaintiffs are not  
21 entitled to recovery on this ground.

22 2. Collateral for First Loan

23 Plaintiffs further allege Defendants misrepresented that only the San Diego Property was  
24 encumbered as collateral for the First Loan. The Neros testified they believed the First Loan was  
25 secured by the San Diego Property only and not the Dennis Court Property. The Loan Escrow  
26 Instructions (Exhibit 43) signed by Mr. Nero, and the Mortgage Loan Disclosure Statement (Exhibit  
27 35) signed by both Plaintiffs, clearly indicate a lien was placed on both the Dennis Court Property  
28 and the San Diego Property. Apart from Plaintiffs' allegations, there is no evidence that any  
Defendants intentionally misrepresented the terms and conditions of the First Loan to Plaintiffs.  
Conversely, the record indicates that Plaintiffs knew or should have known that both properties were  
encumbered. Accordingly, Plaintiffs are not entitled to relief on this ground.

1           3.       Option to Refinance Second Loan

2           Lastly, Plaintiffs allege Defendants misrepresented they would have an option to refinance  
3 the Second Loan after one year. However, there is insufficient evidence to conclude Defendants  
4 made such a misrepresentation. Although Plaintiffs testified at the time of trial they were promised  
5 the option to re-finance after one year, there is no evidence in the record such a promise was made  
6 by either Potts or Defendants. In fact, at time of deposition, both Plaintiffs acknowledged there was  
7 no promise to re-finance. Further, Tondelli himself testified that no such promise was made by him  
8 or Presidio. Based thereon, the Court cannot conclude Defendants intentionally misrepresented an  
9 option to refinance the Second Loan. Thus, Plaintiffs are not entitled to relief on this ground.

10       **E.       Breach of Fiduciary Duty**

11           In Count 2 of the complaint, Plaintiffs contend “Defendants breached their fiduciary duty to  
12 Plaintiffs, by acting dishonestly and failing to disclose material terms that would alter Plaintiffs’  
13 loan repayment.” (ECF No. 1 at 10.) At trial, Plaintiffs argued Defendants placed them in two  
14 situations where they were “bound to fail, and they did.” Further, Plaintiffs argued Defendants  
15 engaged in a pattern and practice of hard-money lenders acting like pawn brokers, thereby ignoring  
16 their fiduciary duties to the Neros.

17           To establish a cause of action for breach of fiduciary duty, Plaintiffs must show “the  
18 existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. The  
19 absence of any one of these elements is fatal to the cause of action.” *Pierce v. Lyman*, 1 Cal. App.  
20 4th 1093, 1101 (1991); *Pellegrini*, 165 Cal. App. 4th at 524. To be charged with a fiduciary  
21 obligation, a party ““must either knowingly undertake to act on behalf and for the benefit of another,  
22 or must enter into a relationship which imposes that undertaking as a matter of law.”” *City of Hope*  
23 *Nat. Medical Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 385 (2008) (citing *Comm. on Children’s*  
24 *Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 221 (1983)). In this case, Plaintiffs contend  
25 Defendants were subject to two sets of fiduciary duties: those imposed by the Agency Agreements  
26  
27  
28

1 and those arising from Defendants' position as mortgage brokers.<sup>12</sup>

2 1. The 2006 and 2007 Agency Agreements

3 As Plaintiffs' exclusive agent under the 2006 and 2007 Agency Agreements, Plaintiffs argue  
4 Defendants were charged with a duty to represent Plaintiff's best interests. The scope of  
5 Defendants' fiduciary duty under the Agency Agreements derives from the general law of agency.  
6 *See* Rest. 3d Agency § 8.01 (2006 Ed.) ("An agent has a fiduciary duty to act loyally for the  
7 principal's benefit in all matters connected with the agency relationship."). Thus, here, Defendants'  
8 duties under the Agency Agreements are limited to the scope of the agency as set forth in the  
9 agreements themselves. *See id.* at § 8.07; *Carleton v. Tortosa*, 14 Cal. App. 4th 745, 755 (1993)  
10 (citing Rest. 2d Agency § 376 (1958 Ed.)).

11 a. The 2006 Agency Agreement

12 The 2006 Agency Agreement states Presidio "agrees to use its best efforts during the Agency  
13 appointment to secure a lender to make Borrowers a loan" in accordance with the terms of the  
14 Mortgage Loan Disclosure Statement. (Exhibit 34.) In turn, the Mortgage Loan Disclosure  
15 Statement provides that if the loan is made, Plaintiffs agree to pay the principal amount of \$350,000  
16 and interest at 10.5% per year, payable in sixty monthly payments of \$3062.50 and a final/balloon  
17 payment of \$350,000 to pay off the loan in full. (Exhibit 35.) The record indicates Defendants  
18 secured a loan that matched these terms. Therefore, based on the record, there is no evidence  
19 Defendants failed to represent Plaintiffs' best interests in satisfying the express purpose of the  
20 Agency Agreement, i.e. to secure a lender to make Plaintiffs a loan in accordance with the terms of  
21 the Mortgage Loan Disclosure Statement.

22 Although Defendants satisfied the express purpose of the 2006 Agency Agreement, Plaintiffs  
23 seem to argue Defendants breached their duty to advise them of the risks associated with the terms  
24 of the First Loan. Specifically, Plaintiffs claim they could not afford a \$350,000 loan, nor did they

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26 <sup>12</sup> The Court notes Plaintiffs seem to misidentify Defendants as "real estate brokers" in pre-trial documents. (*See*  
27 ECF No. 66 at 22.) Where a fiduciary duty is found to exist, Plaintiffs argue a "real estate agent must fulfill it by exhibiting  
28 the degree of care and skill ordinarily exhibited by professionals in the industry." (*Id.*) According to his testimony, Tondelli  
acted as a mortgage broker, not a real estate broker, in this case. Thus, the fiduciary duties of real estate brokers are not  
applicable.

1 need a loan of this amount to purchase the Dennis Court Property. Plaintiffs further contend  
2 Defendants should have deterred them from encumbering the Dennis Court Property as collateral for  
3 the loan. However, there is no evidence the 2006 Agency Agreement imposed a duty on Defendants  
4 to provide general financial advice during the loan application process. Even so, the record suggests  
5 the First Loan may have been in Plaintiffs' best interests at the time. The Neros were eager to own a  
6 home in Imperial, but they could not qualify for a conforming or sub-prime mortgage. Given their  
7 financial situation, a hard-money loan from Evans was a reasonable option. The First Loan also  
8 afforded Plaintiffs the opportunity to renovate the San Diego Property, pay-down other debts and  
9 rebuild their credit. While the monthly payments comprised a substantial portion of their monthly  
10 income, Plaintiffs made nine timely payments on the First Loan, totaling approximately \$27,000.

11 Based thereon, the Court finds Plaintiffs failed to demonstrate Defendants breached their  
12 fiduciary duties arising from the 2006 Agency Agreement.

13 b. The 2007 Agency Agreement

14 Similarly, the 2007 Agency Agreement states Presidio "agrees to use its best efforts during  
15 the Agency appointment to secure a lender to make Borrowers a loan" in accordance with the terms  
16 of the Mortgage Loan Disclosure Statement. (Exhibit 10.) The January 9, 2007 Mortgage Loan  
17 Disclosure Statement provides that if the loan is made, Plaintiffs agree to pay the principal amount  
18 of \$164,000 and interest at 11.5% per year, payable in sixty monthly payments of \$1571.63 and a  
19 final/balloon payment of \$164,000 to pay off the loan in full. (Exhibit 12.) Plaintiffs admitted  
20 Defendants secured a loan that matched these terms. Thus, based on the evidence before the Court,  
21 there is no indication Defendants failed to represent Plaintiffs' best interests in satisfying the express  
22 purpose of the 2007 Agency Agreement.

23 Plaintiffs also argue Defendants breached their duty to advise them of the risks associated  
24 with the terms of the Second Loan. Again, nothing in the record suggests a second hard-money loan  
25 was not in Plaintiffs' best interests at the time. Plaintiffs' credit had not improved since the First  
26 Loan transaction and they could not qualify for a conforming or sub-prime mortgage. Without  
27 another loan from Evans, Mrs. Nero testified her family would have been homeless. Moreover,  
28 there was no indication that Plaintiffs could not afford the Second Loan when they agreed to its

1 terms. At the time, Plaintiffs had a combined monthly income of \$3600 a month. Under the Second  
2 Loan, their monthly interest only payment to Evans was reduced to \$1571.67. There was no reason  
3 for Defendants to anticipate Plaintiffs could not make these payments. Indeed, Plaintiffs testified  
4 they were happy with the terms of the Second Loan.

5 Furthermore, there is no evidence the Agency Agreement imposed a duty to act on Plaintiffs'  
6 behalf after circumstances had changed and they could no longer afford their monthly payments.  
7 The Agency Agreement provides the "agency appointment shall be irrevocable until February 19,  
8 2007." Mr. Nero testified Plaintiffs were able to make their payment under the Second Loan for  
9 fourteen months, long after this date. Even if the agency relationship survived, the Agreement  
10 expressly states that "a dual-agency relationship may exist as [Presidio] may also be an agent for the  
11 lender." (Exhibit 10.) The foreclosure of Plaintiffs' home does not impose liability on Defendants  
12 for breach of the fiduciary duties arising from the Agency Agreement.

13 Accordingly, the Court finds Plaintiffs also failed to demonstrate Defendants breached their  
14 fiduciary duties arising from the 2007 Agency Agreement.

15 2. Fiduciary Duties of Mortgage Brokers

16 In addition to the fiduciary duties imposed by the 2006 and 2007 Agency Agreements,  
17 Plaintiffs contend Defendants were subject to fiduciary duties arising from their position as  
18 mortgage brokers. Plaintiffs allege Defendants breached these duties by failing to disclose material  
19 terms of the loans.

20 Under California law, mortgage brokers owe a fiduciary duty to their clients. *See* CAL. FIN.  
21 CODE § 4979.5(a) ("A person who provides brokerage services to a borrower in a covered loan  
22 transaction by soliciting lenders or otherwise negotiating a consumer loan secured by real property,  
23 is the fiduciary of the consumer."). According to the California Supreme Court, mortgage brokers  
24 have an obligation to "make a full and accurate disclosure of the terms of a loan to borrowers and to  
25 act always in the utmost good faith toward their principals." *Wyatt v. Union Mortgage Co.*, 24 Cal.  
26 3d 773, 782 (1979). This includes the duty to disclose all material facts that may affect the  
27 principal's decision. *Id.* When brokering a loan for borrowers of modest means and limited  
28 financial experience, mortgage brokers also have "duties of oral disclosure and counseling" with

1 regards to the material terms of the loan. *Id.* at 783-84.

2 In *Wyatt v. Union Mortgage Co.*, an action against a mortgage broker seeking damages for  
3 breach of fiduciary duty, plaintiffs testified they did not read the loan documents before signing  
4 them, but instead asked their broker a series of questions regarding the terms of the loan, including  
5 the rate of interest, late payments and the size of the balloon payment. In response, the mortgage  
6 broker provided “materially misleading and incomplete information.” *Id.* at 783. Though the  
7 correct terms were available on loan documents, the California Supreme Court concluded the  
8 broker’s material misrepresentations constituted a breach of his fiduciary obligations. The Court  
9 explained:

10 Here, the record discloses that respondents were persons of modest means and  
11 limited experience in financial affairs, whose equity in their home was their  
12 principal asset. They retained a mortgage loan broker to negotiate for them highly  
13 complex loan terms and they may be assumed to have justifiably relied on the  
14 latter’s expertise. Against such a backdrop, the broker’s failure to disclose orally  
15 the true rate of interest, the penalty for late payments or the swollen size of the  
balloon payment clearly constituted breach of the broker’s fiduciary obligations. It  
is noteworthy also that the provisions regarding interest rate, late charges and  
balloon payment were highly unfavorable to the borrower and yet the broker made  
no attempt to draw his clients’ attention to these matters.

16 *Id.* at 783-84.

17 Although some cases have interpreted *Wyatt* as obligating mortgage brokers to orally  
18 disclose the terms of the loan agreements and counsel borrowers on the loans’ material terms,  
19 including the rate of interest, possible penalties and balloon payment (*See Zimmer v. Nawabi*, 566 F.  
20 Supp. 2d 1025, 1031-33 (E.D. Cal. 2008)), other cases have declined to extend *Wyatt* in such a  
21 manner, concluding that such a broker has duties that “arise from a prohibition against making  
22 affirmative misrepresentations rather than from a duty to explain the ins and outs of each loan  
23 product.” *Stetler v. Greenpoint Mortgage Funding, Inc.*, 2008 WL 192405, \*7 (E.D. Cal. 2008).

24 Plaintiffs failed to provide evidence that Defendants breached fiduciary duties owed to  
25 Plaintiffs in this case. Significantly, Plaintiffs did not present any evidence that Tondelli, Dale  
26 Huntley, or any other Presidio employee failed to disclose all material facts that may affect  
27 Plaintiffs’ decision regarding their loans. *Wyatt*, 24 Cal. 3d at 783. Conversely, Plaintiffs testified  
28 they received the loan described in their loan documents. Certainly, Defendants had a duty to

1 exhaustively explain issues that Plaintiffs did not understand. In this regard, Plaintiffs were free to  
2 ask questions. However, unlike the plaintiffs in *Wyatt*, the evidence shows Plaintiffs never asked  
3 Defendants questions regarding the terms of their loans. Consequently, Defendants never responded  
4 to Plaintiffs' inquiries with affirmative misrepresentations.

5 Moreover, Plaintiffs failed to prove they incurred damages as a proximate result of  
6 Defendants' alleged breach of fiduciary duty. As to the First Loan, there is no evidence Plaintiffs  
7 would have avoided the \$14,700 prepayment penalty to Evans if counseled on the terms of the loan.  
8 (*See Exhibit 15.*) All of the witnesses testified that had Plaintiffs waited two weeks, the prepayment  
9 penalty provision on the First Loan would have expired and they would not have owed this amount.  
10 However, the evidence also indicates Plaintiffs were eager to purchase the Cahuilla Property. Maria  
11 Nero testified that after the birth of their third child, the family needed a home with more room.  
12 Potts also testified Plaintiffs insisted on closing on the Cahuilla Property as quickly as possible.  
13 Thus, the Court cannot determine with certainty whether Plaintiffs incurred damage as a proximate  
14 result of Defendants' alleged breach of fiduciary duty.

15 As to the Second Loan, there is also no evidence Defendants' alleged failure to disclose  
16 material terms proximately caused Evans to foreclose on the Cahuilla Property. Plaintiffs admitted  
17 that their financial circumstances changed dramatically after making four payments on the Second  
18 Loan. Christopher Nero's substantial medical problems increased Plaintiffs' expenses, while  
19 simultaneously decreasing the family's earning capacity. At the same time, the housing market  
20 crashed nationwide and Plaintiffs' mortgage on the Cahuilla Property exceeded the value of the  
21 home. Christopher Nero conceded that but for these circumstances, Plaintiffs would have made their  
22 payments on the Second Loan. Accordingly, the Court cannot find Plaintiffs incurred damage as a  
23 proximate result of Defendants' alleged breach of fiduciary duty.

24 Based on the foregoing, the Court concludes Plaintiffs failed to establish the essential  
25 elements of breach of fiduciary duty. Thus, Plaintiffs are not entitled to relief on this claim.

## 26 **F. Negligence**

27 In Count 8 of the Complaint, Plaintiffs allege Defendants were negligent in placing them in  
28 the loans at issue. In particular, Plaintiffs suggest Defendants were negligent in relying on their

1 income as stated on loan application documents, thereby placing them in loans they could not afford.

2 At time of trial, however, Plaintiffs made no specific arguments related to their negligence claim.

3 The elements of an action for negligence are: (1) the existence of a duty; (2) a breach of that  
4 duty; (3) causation between defendants' act or omission and plaintiffs' injuries; and (4) damages.  
5 *Merill v. Navegar, Inc.*, 26 Cal. 4th 465, 477 (2001) (citing *Sharon P. v. Arman, Ltd.*, 21 Cal. 4th  
6 1181, 1188 (1999)); *see also* CA BAJI 3.10 (Spring 2011 Ed.) (defining negligence as "the failure to  
7 use ordinary or reasonable care"). "The existence and scope of a duty of care are legal questions for  
8 the court." *Merill*, 26 Cal. 4th at 477 (citing *Ann M. v. Pacific Plaza Shopping Ctr.*, 6 Cal. 4th 666,  
9 674 (1993)). Where a duty is found to exist, a professional "must fulfill it by exhibiting the degree  
10 of care and skill ordinarily exhibited by professionals in the industry." *Carleton v. Tortosa*, 14 Cal.  
11 App. 4th 745, 754 (1993). "The degree of care and skill required to fulfill a professional duty  
12 ordinarily is a question of fact and may require testimony by professionals in the field if the matter is  
13 within the knowledge of experts only." *Id.* (citing *Miller v. Los Angeles County Flood Control Dist.*,  
14 8 Cal. 3d 689, 702 (1973)).

15 Although Plaintiffs presented substantial evidence of Defendants' alleged breach of their  
16 duty of care, they failed to present evidence as to the standard of care imposed on a reasonably  
17 prudent mortgage broker under circumstances similar to those at issue. Typically, proof of  
18 professional negligence, as alleged by Plaintiffs, requires testimony of experts as to the standard of  
19 care in the relevant community. *See Carleton*, 14 Cal. App. at 754. Here, however, Plaintiffs did  
20 not present any expert testimony as to the standard of care owed by mortgage brokers, either through  
21 a designated expert or through Tondelli or Potts. Further, Plaintiffs failed to present any evidence as  
22 to causation between Defendants' allegedly wrongful acts and Plaintiffs' injuries. Given the limited  
23 evidence before it, the Court cannot determine whether Defendants' alleged wrongful acts were  
24 negligent.<sup>13</sup> Accordingly, Plaintiffs are not entitled to relief on this claim.

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27 <sup>13</sup> On May 20, 2011, after the trial had ended, Plaintiffs filed a Request for Judicial Notice of the Mortgage Loan  
28 Broker Compliance Evaluation Manual issued by the State of California Department of Real Estate. (ECF No. 76-1.) This  
publication identifies the obligations of mortgage brokers. The Court denied Plaintiffs' Request on May 24, 2011, stating  
it would not accept additional evidence at that stage of the proceedings. (ECF No. 80.)

1 **G. California's Predatory Lending Act, California Financial Code § 4970, et seq.**

2 In Count 7 of the Complaint, Plaintiffs contend Defendants' conduct violated California  
3 Financial Code § 4970, et seq. Specifically, at trial Plaintiffs argued Defendants violated this statute  
4 when they failed to (1) disclose in writing an alternative to a loan with a prepayment fee, and (2)  
5 provide a consumer caution and home ownership counseling notice.

6 1. The Law

7 In 2001, California enacted Financial Code Sections 4970 et. seq., also known as the  
8 "Predatory Lending Act," which regulates predatory lending practices in home loans if certain  
9 criteria apply. One criteria is that "the principal amount of the loan does not exceed the current  
10 conforming first mortgage size limit for a single-family dwelling as established by the Federal  
11 National Mortgage Association."<sup>14</sup> CAL. FIN. CODE § 4970(b). If this criteria is met, then a consumer  
12 loan is a "covered loan" if one of the following two criteria is also met: (1) for a mortgage or deed of  
13 trust, the annual percentage rate at consummation of the transaction will exceed by more than 8  
14 percentage points the yield on Treasury securities having comparable periods of maturity on the 15<sup>th</sup>  
15 day of the month immediately preceding the month in which the application for the extension of  
16 credit is received by the creditor; or (2) that the total points and fees payable by the consumer at or  
17 before closing for a mortgage and deed of trust will exceed 6 percent of the total loan amount. *Id.* at  
18 § 4970(b)(1)-(2). For purposes of this statute, a "consumer loan" means a "consumer credit  
19 transaction that is secured by real property located in this state used, or intended to be used or  
20 occupied, as the principal dwelling of the consumer that is improved by a one-to-four residential  
21 unit." *Id.* at § 4970(d).

22 California Financial Code § 4973(2) lists the following as prohibited acts and limitations for  
23 covered loans: "A covered loan may include a prepayment fee or penalty up to the first 36 months  
24 after the date of consummation of the loan if: (A) The person who originates the covered loan has  
25 also offered the consumer a choice of another product without a prepayment fee or penalty. (B) The  
26 person who originates the covered loan has disclosed in writing to the consumer at least three

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28 <sup>14</sup> From 2007 until 2010, the conforming loan limits for a single family was \$417,000.

1 business days prior to loan consummation the terms of the prepayment fee or penalty to the  
 2 consumer for accepting a covered loan with the prepayment penalty and the rates, points, and fees  
 3 that would be available to the consumer for accepting a covered loan without a prepayment  
 4 penalty.”<sup>15</sup>

5 Further, “[a] person who originates covered loans shall not make or arrange a covered loan  
 6 unless at the time the loan is consummated, the person reasonably believes the consumer, or  
 7 consumers...will be able to make the scheduled payments to repay the obligation based upon a  
 8 consideration of their current and expected income, current obligations, employment status, and  
 9 other financial resources.” *Id.* at § 4973(f)(1).

10 California Financial Code § 4973(k)(1) states that a covered loan shall not be made unless a  
 11 written disclosure in 12-point font or larger containing mandated text and entitled “CONSUMER  
 12 CAUTION AND HOME OWNERSHIP COUNSELING NOTICE” is provided.

13 California Financial Code § 4979.5 states that any person who provides brokerage services to  
 14 a borrower in a covered loan transaction by soliciting lender is the fiduciary of the consumer, and  
 15 any violation of the fiduciary duties shall be a violation of this section.

16 Pursuant to California Financial Code § 4978(a), “A person who fails to comply with the  
 17 provisions of this division is civilly liable to the consumer in an amount equal to any actual damages  
 18 suffered by the consumer, plus attorneys fees and costs. For a willful and knowing violation of this  
 19 division, the person shall be liable to the consumer in the amount of fifteen thousand dollars  
 20 (\$15,000) or the consumers actual damages, whichever is greater, plus attorney’s fees and costs.”

## 21 2. Discussion

22 With regard to the First Loan, the evidence presented at trial demonstrates this loan is not a  
 23 “covered loan” as defined by California Financial Code § 4970. In Exhibit 49, the Loan Purpose  
 24 Statement for the First Loan signed by Plaintiffs on January 18, 2006, Plaintiffs indicated the  
 25 proceeds of the First Loan were to be used primarily for the purchase, construction, or improvement  
 26 of real property as well as for business purposes. At trial, Plaintiffs testified the purpose of the First

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27  
 28 <sup>15</sup>The Court has not included California Financial Code § 4973(2)(C)-(E) in its discussion as these provisions are not relevant to the issues presented at trial.

1 loan was to purchase the Dennis Court property and fix up and rent the San Diego property.  
2 Therefore, the First Loan is not a “consumer loan” as defined by California Financial Code  
3 § 4970(d), and consequently is not a “covered loan.” Based thereon, the prohibitions and limitations  
4 for covered loans, as listed in California Financial Code § 4973, do not apply to the First Loan.

5 Conversely, the evidence presented at trial demonstrates the Second Loan is a “covered loan”  
6 as defined by California Financial Code § 4970. First, the Second Loan in the amount of \$164,000  
7 does not exceed the \$417,000 conforming loan limit for a single family. CAL. FIN. CODE § 4970(b).  
8 Second, the total fees and commissions paid by Plaintiffs on the Second Loan of \$13,340.16 was in  
9 excess of 6 percent of the total loan amount of \$164,000.<sup>16</sup> *Id.* at § 4970(b)(2). Accordingly, the  
10 Second Loan is a “covered loan” and subject to the prohibitions and limitations imposed by  
11 California Financial Code § 4973.

12 With regard to the requirements set forth in California Financial Code § 4973(2)(A)-(B) for  
13 prepayment penalties, the evidence at trial demonstrates Plaintiffs were offered a product without a  
14 prepayment fee or penalty in relation to the Second Loan. Specifically, James Potts testified he  
15 informed Plaintiffs of an option without a prepayment penalty. However, the evidence at trial  
16 demonstrates this offer was not disclosed in writing to Plaintiffs three business days prior to  
17 consummation of the loan. Defendant Tondelli also testified he did not know whether the offer  
18 without a prepayment penalty was provided in writing to Plaintiffs. Therefore, Defendants violated  
19 California Financial Code § 4973(2)(B).

20 With regard to California Financial Code § 4973(f)(1), the evidence at trial demonstrates  
21 Defendants reasonably believed Plaintiffs would be able to make the scheduled payments to repay  
22 the Second Loan based on their income, current obligations, and employment status. The monthly  
23 mortgage payment on the Cahuilla Property was \$1571.67. (Exhibit 9.) Exhibit 9, Plaintiffs’  
24 Uniform Residential Loan Application for the Second Loan, lists Plaintiffs’ combined income as  
25 \$6,246. However, Plaintiff Christopher Nero testified Plaintiffs’ combined income was \$3600.  
26 Despite the discrepancy in Plaintiffs’ combined income, Defendants were reasonable to believe  
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28 <sup>16</sup> 6 percent of \$164,000 is \$9,840.00.

1 Plaintiffs would be able to make the almost \$1600/month mortgage payments. Further, Plaintiff  
2 Christopher Nero testified on cross-examination that if his financial circumstances had not changed,  
3 he would have been able to continue making payments on the Second Loan. Therefore, Defendants  
4 did not violate California Financial Code § 4973(f)(1).

5 With regard to California Financial Code § 4973(k)(1), the Court finds Plaintiffs received  
6 and signed the Consumer Caution and Home Ownership Counseling Notice. (Exhibit 48). Although  
7 Plaintiff Maria Nero testified she never signed this document, the Court finds Ms. Nero's signature  
8 on the Consumer Caution and Home Ownership Counseling Notice to be the same as Ms. Nero's  
9 signature on the Dennis Court Deed of Trust (Exhibit 2), and the April 18, 2006 Agency Agreement  
10 (Exhibit 34). Therefore, the Court finds Ms. Nero's statement that she did not sign the Consumer  
11 Caution and Home Ownership Counseling Notice is not credible. And regardless of Ms. Nero's  
12 statement, Mr. Nero definitely signed the Consumer and Home Ownership Counseling Notice.  
13 Accordingly, Defendants did not violate California Financial Code § 4973(k)(1).

14 With regard to California Financial Code § 4979.5, the Court finds Defendants did not  
15 violate any fiduciary duties owed to Plaintiffs. Accordingly, Defendants did not violate California  
16 Financial Code § 4979.5.

17 As discussed above, Defendants sole violation of the Predatory Lending Act was their failure  
18 to disclose in writing the terms of the prepayment fee or penalty, and the rate, points and fees that  
19 would be available to the consumer for accepting a covered loan without a prepayment penalty, as  
20 required by California Financial Code § 4973(2)(B). However, Defendants' failure to provide an  
21 alternative to a prepayment penalty in writing did not impact Plaintiffs in any way. Plaintiffs never  
22 had to pay any prepayment penalties on the Second Loan, and therefore suffered no actual damages  
23 as a result of Defendants' violation of California Financial Code § 4973(2)(B).

24 In light of the fact Plaintiffs did not suffer actual damages, Plaintiffs are not entitled to  
25 recover attorney's fees or costs. California Financial Code § 4978(a) states: "A person who fails to  
26 comply with the provisions of this division is civilly liable to the consumer in an amount equal to  
27 any actual damages suffered by the consumer, *plus* attorneys fees and costs." (emphasis added). "It  
28 is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so

1 construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or  
2 insignificant.’ ” *TRW Inc. v. Andrews*, 534 U.S. 19, 31(2001) (quoting *Duncan v. Walker*, 533 U.S.  
3 167, 174 (2001)). Based on the plain language of the statute, there is no indication Plaintiffs are  
4 entitled to attorneys’ fees and costs absent actual damages. Therefore, because Plaintiffs did not  
5 suffer actual damages, Plaintiffs are not entitled to recover attorney’s fees or costs. CAL. FIN. CODE  
6 § 4978(a).

7 **H. California Civil Code § 2923.5**

8 In Count 18 of the Complaint, Plaintiffs allege Defendants violated California Financial  
9 Code § 2923.5 by failing to assess Plaintiffs’ financial situation and explore options to avoid  
10 foreclosure 30 days prior to filing the default. Based thereon, Plaintiffs contend the foreclosure of  
11 the Cahuilla Property was wrongful.

12 California Financial Code § 2923.5(a)(2) provides that, prior to filing a notice of default, the  
13 mortgagee, beneficiary, or authorized agent must “contact the borrower in person or by telephone in  
14 order to assess the borrower’s financial situation and explore options for the borrower to avoid  
15 foreclosure.” Further, California Financial Code § 2923(b) provides that “a notice of default filed  
16 pursuant to Section 2924 shall include a declaration that the mortgagee, beneficiary, or authorized  
17 agent has contacted the borrower, has tried with due diligence to contact the borrower as required by  
18 this section, or that no contact was required pursuant to subdivision (h).”

19 It is evident from the testimony at trial that Plaintiffs Christopher and Maria Nero were  
20 contacted by Nita Evans prior to the filing of a Notice of Default on the Cahuilla Property to assess  
21 their financial situation and explore options for them to avoid foreclosure. Specifically, Plaintiff  
22 Christopher Nero testified Evans offered Plaintiffs two options to modify the Second Loan: (1) to  
23 stay in the Cahuilla Property by paying 3 years interest only, the back taxes due, and pay off the  
24 remainder of the loan, in whole, at the end of that 3-year period; or (2) Evans would pay all the back  
25 taxes, Plaintiffs would deed the property to Evans, Plaintiffs could stay in the Cahuilla Property for 3  
26 years making reduced rental payments, and Plaintiffs would have the option to buy the house back at  
27 the end of the 3-year period for the loan amount. Plaintiffs rejected both offers. However, no  
28 evidence was presented at trial that anyone provided a declaration that the mortgagee, beneficiary, or

1 authorized agent had contacted Plaintiffs, as required by California Financial Code § 2923(b). In  
2 fact, Defendant Tondelli testified he was unaware if Evans provided Plaintiffs a written declaration.

3 Nevertheless, despite the failure to provide a declaration required by California Financial  
4 Code § 2923(b), it is unclear from the testimony at trial whether Tondelli is an “authorized agent” as  
5 envisioned by this statute, and therefore obligated to comply with this provision. The testimony at  
6 trial demonstrated that Evans was the lender on the Plaintiffs’ Second Loan for the Cahuilla  
7 Property. Although Defendant Tondelli testified he had an agency agreement with Evans, it is not  
8 clear from the testimony what that agency relationship entailed. Specifically with regard to the  
9 Notice of Default, Defendant Tondelli testified that he prepared and recorded the Notice of Default,  
10 which identifies Presidio Mortgage, Inc., as the duly appointed Trustee and Nita E. Evans as the  
11 original beneficiary, under the Deed of Trust executed by Plaintiffs. (Exhibit 27.) However, the  
12 Declaration of Default and Demand for Sale lists Nita E. Evans as the beneficiary under the Deed of  
13 Trust of the Cahuilla Property. (Exhibit 42.) Therefore, based on the limited evidence presented at  
14 trial as to Ms. Evans’ and Tondelli’s agency relationship, and the evidence that Evans was the  
15 beneficiary for purpose of the relevant statutes, the Court cannot determine whether Defendant  
16 Tondelli is an “authorized agent” under California Financial Code § 2923.5. Thus, the Court cannot  
17 determine whether Defendants Tondelli and Presidio were required to assess Plaintiffs’ financial  
18 situation and explore options to avoid foreclosure 30 days prior to filing the default, as well as  
19 include a declaration that they complied with these requirements.

20 However, even if this Court were to find that Tondelli was an authorized agent and thereby  
21 required to file a declaration that he contacted, or that contacts were made with Plaintiffs to discuss  
22 loan modification options, there is no remedy at law. “The remedy for a violation of the statute  
23 requiring a lender to contact the borrower to explore options to prevent foreclosure before filing a  
24 notice of default is limited to obtaining a postponement of an impending foreclosure to permit the  
25 lender to comply with the statute.” *Mabry v. Superior Court*, 185 Cal. App. 4th 208 (2010). Here,  
26 foreclosure proceedings have already taken place and therefore, even if there is a technical violation  
27 of the statute, there is no available remedy at law. Accordingly, Plaintiffs are not entitled to any  
28 recovery under this statute.

1 **I. Breach of Contract**

2 In their Count 21, Plaintiffs allege Defendants breached the Agency Agreement by failing to  
 3 properly carry out their duties as an agent.<sup>17</sup> Plaintiffs contend Defendants failed to properly  
 4 represent Plaintiffs' interests, failed to properly advise Plaintiffs and failed to properly warn  
 5 Plaintiffs of any potential harms in entering a hard-money loan. Ultimately, as to the Second Loan,  
 6 Defendants refused to modify its terms at Plaintiffs' request and recorded a Notice of Default on  
 7 Evans' behalf. At time of trial, Plaintiffs also seemed to allege that Defendants breached an oral  
 8 contract to refinance the Second Loan after one year.

9 To state a claim for breach of contract under California law, Plaintiffs must establish: (1) the  
 10 existence of a contract; (2) Plaintiffs' performance or excuse for nonperformance of the contract; (3)  
 11 Defendants' breach of the contract; and (4) resulting damages. CA BAJI 13.85 (Spring 2011 Ed.);  
 12 *see also Armstrong Petrol. Corp. v. Tri Valley Oil & Gas Co.*, 116 Cal. App. 4th 1375, 1391 n. 6  
 13 (2004) (citing *Careau & Co. v. Security Pacific Business Credit, Inc.*, 222 Cal. App. 3d 1371, 1388  
 14 (1990)).

15 1. The 2006 Agency Agreement

16 There is no evidence in the record that Defendants failed to perform their duties under the  
 17 January 18, 2006 Agency Agreement in connection with the First Loan transaction. The agreement  
 18 provides Presidio "agrees to use its best efforts during the Agency appointment to secure a lender to  
 19 make Borrowers a loan" in accordance with the terms of the Mortgage Loan Disclosure Statement.  
 20 (Exhibit 34.) The Mortgage Loan Disclosure Statement, also dated January 18, 2006, states that if  
 21 the loan is made, Plaintiffs agree to pay the principal amount of \$350,000 and interest at 10.5% per  
 22 year, payable in sixty monthly payments of \$3062.50 and a final/balloon payment of \$350,000 to  
 23 pay off the loan in full. (Exhibit 35.) The record indicates the terms of the First Loan matched these  
 24 terms. Accordingly, Defendants performed their duty to fulfill the stated purpose of the  
 25 2006 Agency Agreement, i.e., to find and secure a loan in accordance with the terms of the Mortgage  
 26

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27 <sup>17</sup> While Plaintiffs' Complaint refers to a single Agency Agreement, Plaintiffs presented evidence of two agreements  
 28 at trial: the 2006 Agency Agreement and the 2007 agreement. Therefore, the Court will consider both agreements in regards  
 to this cause of action.

1 Loan Disclosure Statement. Thus, Plaintiffs are not entitled to relief on this claim.

2 2. The 2007 Agency Agreement

3 Likewise, there is no evidence in the record that Defendants failed to perform their duties  
4 under the January 9, 2007 Agency Agreement in connection with the Second Loan transaction. The  
5 2007 Agency Agreement also states Presidio “agrees to use its best efforts during the Agency  
6 appointment to secure a lender to make Borrowers a loan” in accordance with the terms of the  
7 Mortgage Loan Disclosure Statement. (Exhibit 10.) The January 9, 2007 Mortgage Loan  
8 Disclosure Statement provides that if the loan is made, Plaintiffs agree to pay the principal amount  
9 of \$164,000 and interest at 11.5% per year, payable in sixty monthly payments of \$1571.63 and a  
10 final/balloon payment of \$164,000 to pay off the loan in full. (Exhibit 12.) Plaintiffs admitted the  
11 terms of the Second Loan matched the terms provided by the Mortgage Loan Disclosure Statement.  
12 They further testified they were happy with the monthly payments under the Second Loan, as they  
13 were approximately half the payments due under the First Loan. Therefore, Defendants also  
14 performed their duty to fulfill the stated purpose of the 2007 Agency Agreement, i.e., to find and  
15 secure a loan in accordance with the terms of the Mortgage Loan Disclosure Statement.

16 Plaintiffs further suggest Defendants breached the terms of the 2007 Agency Agreement by  
17 refusing to modify the terms of the Second Loan and ultimately recording a Notice of Default on  
18 Evans’ behalf. However, as Mr. Nero acknowledged at trial, the terms of the 2007 Agency  
19 Agreement do not require Presidio to refinance the Second Loan at Plaintiffs’ request. Indeed, the  
20 agreement does not impose any obligations on Defendants after its express purpose – to find and  
21 secure a loan in accordance with the terms of the Mortgage Loan Disclosure Statement – had been  
22 satisfied. In addition, the terms of the 2007 Agency Agreement do not prohibit Defendants from  
23 preparing and recording the Notice of Default on Evans’ behalf. The agreement expressly states that  
24 “a dual-agency relationship may exist as [Presidio] may also be an agent for the lender.” (Exhibit  
25 10.) Therefore, the Court cannot conclude Defendants’ actions after securing the Second Loan  
26 breached the 2007 Agency Agreement. Based on the foregoing, the Court finds Plaintiffs are not  
27 entitled to relief on this claim.

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1           3.       Oral Contract to Refinance

2           At trial, Plaintiffs seemed to argue there was an obligation to refinance the Second Loan after  
3 one year arising from an oral contract. Apart from Plaintiffs' testimony of the existence of such an  
4 agreement, there is no evidence in the record of a promise or agreement that could rise to the level of  
5 a contractual obligation. In fact, at deposition both Plaintiffs testified that there was no promise or  
6 agreement to refinance. Based thereon, the Court finds Plaintiffs are not entitled to relief based upon  
7 an oral contract.

8       **J.       Breach of Covenant of Good Faith and Fair Dealing**

9           In Count 3 of the Complaint, Plaintiffs contend the parties' Agency Agreements contained an  
10 implicit covenant of good faith and fair dealing requiring Defendants to act honestly and in good  
11 faith in the performance and enforcement of the contract. Thus, even if Defendants did not breach  
12 the express terms of the Agency Agreements, Plaintiffs seem to argue Defendants' alleged predatory  
13 lending practices violated general principles of fairness.

14           Pursuant to California law, "[t]here is an implied covenant of good faith and fair dealing in  
15 every contract that neither party will do anything which will injure the right of the other to receive  
16 the benefits of the agreement." *Kransco v. American Empire Surplus Lines Ins. Co.*, 23 Cal. 4th  
17 390, 400 (2000) (quoting *Comunale v. Traders & General Ins. Co.*, 50 Cal. 2d 654, 658 (1958)).  
18 The "implied covenant of good faith and fair dealing is limited to assuring compliance with the  
19 *express terms* of the contract, and cannot be extended to create obligations not contemplated by the  
20 contract." *Pasadena Live, LLC v. City of Pasadena*, 114 Cal. App. 4th 1089, 1094 (2004) (emphasis  
21 in original) (citing 1 Witkin, Summary of Cal. Law (2003 supp.) Contracts § 743, p. 449).

22           Here, there is no evidence Defendants failed to comply with the *express terms* of the Agency  
23 Agreements, i.e., to find and secure a loan in accordance with the terms of the corresponding  
24 Mortgage Loan Disclosure Statements. Plaintiffs testified that in both the First and Second Loan  
25 transactions, Defendants secured loans that matched the terms Plaintiffs agreed upon in the  
26 Mortgage Loan Disclosure Statements. Because the Agency Agreements' implied covenants of  
27 good faith and fair dealing do not afford Plaintiffs relief for any alleged violations outside of the  
28 limited terms of the agreements, Plaintiffs are not entitled to relief on this claim.

**K. California Civil Code § 1572**

In Count 19 of the Complaint, Plaintiffs contend Defendants' misrepresentations and failures to disclose material information during the loan application process constituted actual fraud in violation of California Civil Code § 1572. Section 1572 defines five variations of "actual fraud" as follows:

Actual fraud, within the meaning of this Chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
3. The suppression of that which is true, by one having knowledge or belief of the fact;
4. A promise made without any intention of performing it; or,
5. Any other act fitted to deceive.

CAL. CIV. CODE § 1572. This section "is limited to acts committed by one party to a contract with intent to deceive another party to the contract or to induce someone to enter into a contract." *Masters v. San Bernadino County Employees Retirement Ass'n*, 32 Cal. App. 4th 30, 41 (1995); *see also Wilkins v. National Broadcasting Co., Inc.*, 71 Cal. App. 4th 1066, 1083-84 (1999) (holding plaintiffs failed to state a cause of action under section 1572 because there was no contract between the parties).

The only contracts at issue between Plaintiffs and the remaining Defendants, Tondelli and Presidio, are the 2006 and 2007 Agency Agreements. (*See* Exhibits 10 and 34.) Yet, Plaintiffs failed to present evidence of fraud or deceit with regard to these agreements. Plaintiffs have not alleged, nor does the Court find, Defendants fraudulently induced Plaintiffs to enter the Agency Agreements or suppressed material facts concerning the parties' rights and obligations under these agreements. Additionally, Plaintiffs failed to present evidence of any damages proximately caused by any violation of section 1572. Based on evidence presented at trial, the Court cannot find Plaintiffs are entitled to recovery on this cause of action.

1 **L. California's Unfair Competition Law, Business and Professions Code §§ 17200, et seq.**

2 In Count 16 of the Complaint, Plaintiffs allege Defendants violated California Business and  
3 Professions Code §§ 17200, et seq., by “consummating an unlawful, unfair and fraudulent business  
4 practice, designed to deprive Plaintiffs of their equity in said property.” (ECF No. 1 at 25.)

5 California Business and Professions Code § 17200, et seq., commonly known as California's  
6 Unfair Competition Law, defines unfair competition as “any unlawful, unfair, or fraudulent business  
7 act or practice.” CAL. BUS. AND PROF. CODE § 17200. To state a claim under the Unfair  
8 Competition Law, Plaintiffs must allege facts sufficient to show a violation of some underlying law.  
9 *People v. McKale*, 25 Cal. 3d 626, 635 (1979). As set forth above, Plaintiffs have established  
10 violations of California Financial Code § 2923(b) for failure to provide a written declaration of due  
11 diligence and California Financial Code § 4973(2)(B) for failure to disclose in writing the terms of  
12 the prepayment penalty. However, no evidence was presented that these two technical violations are  
13 sufficient to constitute a violation of California Business and Professions Code §§ 17200, et seq.  
14 Accordingly, Plaintiffs are also unable to recover on this claim.

15 **M. Accounting**

16 Finally, in Count 10, Plaintiffs request an accounting of the “amount of money due, if any  
17 from Plaintiffs to Defendants.” (ECF No. 1 at 17.) Plaintiffs also testified they requested an  
18 accounting from Evans. However, Evans is no longer a Defendant in this case. Further, no evidence  
19 was presented that Tondelli or Presidio owed Plaintiffs a duty to present an accounting. Evans was  
20 the lender and serviced the loans at issue, not Defendants. Accordingly, Plaintiffs are not entitled to  
21 recover on this claim.

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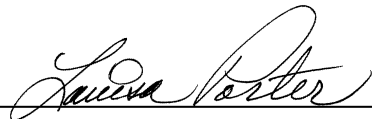
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**VI. CONCLUSION**

Based on the foregoing, the Court directs the clerk to enter judgment in favor of Defendants and against Plaintiffs, and that Plaintiffs are to recover nothing, including attorney's fees and costs.

**IT IS SO ORDERED.**

DATED: July 8, 2011

  
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LOUISA S PORTER  
United States Magistrate Judge

cc: The Honorable Dana M. Sabraw  
The Honorable Peter C. Lewis  
All parties